

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DONNA GARMANY</b>	)	
Claimant	)	
V.	)	
	)	Docket No. 1,064,778
<b>CASEY'S GENERAL STORES</b>	)	
Respondent	)	
AND	)	
	)	
<b>EMCASCO INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the June 13, 2016, Order by Administrative Law Judge (ALJ) Steven M. Roth.

**APPEARANCES**

Gary E. Laughlin, of Topeka, Kansas, and Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for the respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as did the ALJ, including the documents of record filed with the Division.

**ISSUES**

The ALJ granted respondent's Motion to Dismiss and the case was dismissed with prejudice, based on claimant's failure to satisfy the requirements of K.S.A. 44-523(f).

Claimant appeals, arguing "dismissing a claim after three (3) years have expired - regardless of the status of the case - does not fulfill the purpose of the section to dismiss dormant claims only. The rules of statutory construction and the legislative history of K.S.A. 44-523(f) show that good cause to extend the time to regular hearing may be considered even if three (3) years has passed since the filing of an Application for

Hearing”.<sup>1</sup> Claimant requests the Board find claimant has actively prosecuted her case, and the matter should be reversed and remanded to the ALJ for further proceedings, including the regular hearing and the completion of evidence.

Respondent contends the ALJ's Order should be affirmed.

Claimant's issue on appeal is does K.S.A. 2011 Supp. 44-523(f)(1) allow an extension of time for good cause, to proceed to regular hearing, even after (3) three years from the date of an Application for Hearing is filed?

### **FINDINGS OF FACT**

Claimant suffered a work-related accident on March 30, 2012. Initially, claimant sought medical treatment with her family physician, Dr. Seeman. This matter was heavily and actively litigated, with claimant ultimately receiving medical treatment and undergoing surgery for her low back on December 30, 2014, with Dr. Harold Hess. This matter went to preliminary hearing on more than one occasion and was appealed to the Workers Compensation Board twice.

On March 1, 2016, claimant requested a setting for a prehearing settlement conference. The prehearing settlement conference was held on May 11, 2016, and the case was cleared and set for regular hearing on July 18, 2016. On May 12, 2016, respondent filed an Application For Dismissal and a Motion to Dismiss Pursuant to K.S.A. 44-523(f)(1). In support of its motion and application, respondent presented that claimant's date of accident was March 20, 2012, the Application for Hearing was filed March 29, 2013, and more than three years has passed since the filing of the Application for Hearing. As no Motion to Extend had been filed, respondent contended the claim should be dismissed with prejudice.

Claimant continues to have followup visits with Dr. Hess, last meeting with the doctor in May 2016, to check on the healing of the surgical fusion. Claimant is scheduled to see Dr. Hess again in August 2016. Claimant continues to take medication daily for pain and is in need of further medical treatment for her work-related injuries.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2006 Supp. 44-523(f) states:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments

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<sup>1</sup> Claimant's Brief at 22 (filed Jun. 23, 2016).

thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

K.S.A. 2011 Supp 44-523(f) states:

(f) (1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(3) This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

Prior to July 1, 2006, employers and insurance companies had no way to close an inactive case. If the matter did not go to regular hearing or settlement, it could be allowed to languish in litigation limbo for all of eternity. Naturally, this created frustration for employers, insurance companies and adjusters responsible for maintaining reserves on open workers compensation files. In 2006, the Kansas Legislature addressed this concern with the adoption of the above statute. An inactive file now had a solution.

The five year limitation was shortened to three years in 2011. This provision, both the 2006 and 2011 versions, answered the concerns above discussed. A method now existed to close inactive cases.

Concerns arose regarding situations where ongoing activity in a file existed. The time limitation was seen by some as a trap for the unwary. However, the legislature created an answer for those concerns. The time limitation could be extended with the filing of a Motion to Extend, followed by a hearing with the ALJ. However, the motion had to be filed within the time limit set by the statute and claimant had to be able to show a good cause or good faith justification for the extension.

Claimant raises the argument that the language of the statute is, in some way, ambiguous. However, the Board has addressed this argument on several occasions.<sup>2</sup>

While the Board acknowledges its members are not unanimous on this issue, the majority opinion remains consistent.<sup>3</sup>

On this issue, this matter is on point with *Hackler, Hoffman and Ramstad*. Under the literal reading of K.S.A. 2011 Supp. 44-523(f), a motion to extend must be filed within the three year period after an Application for Hearing is filed and claimant must prove good cause to warrant an extension. No application was filed in this matter in the three year period after the filing of the Application for Hearing. The decision by the ALJ to dismiss this matter with prejudice is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be affirmed. Claimant has failed to satisfy the requirements of K.S.A. 44-523(f).

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven M. Roth dated June 13, 2016, is affirmed.

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<sup>2</sup> *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015); *Ramstad v. U.S.D.* 229, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015).

<sup>3</sup> *Hackler v. Peninsula Gaming Partners, LLC*, No. 1,060,759, WL 858312 (Kan. WCAB Feb. 25, 2016), *pet. for rev.* filed March 22, 2016.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2016.

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BOARD MEMBER

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**DISSENT**

The undersigned Board Member respectfully dissents. The Board Majority focuses on the mere passage of three years as being the key to this case. To the contrary, regardless of the inevitable passage of time, the first sentence of K.S.A. 2011 Supp. 44-523(f) clearly states a lack of prosecution is a condition necessary for a respondent to file a motion to dismiss:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal **based on lack of prosecution**.

Dismissal of claimant's case is inappropriate because her case was not stale, inactive or suffered from lack of prosecution. In fact, a pre-hearing settlement conference was held one day prior to respondent filing its Motion to Dismiss and a regular hearing was scheduled for two months later.

K.S.A. 2011 Supp. 44-523(f) does not clearly, plainly or unambiguously state that a claimant taking longer than three years to proceed to a regular hearing, settlement hearing or award after filing an application for hearing is guilty of failing to prosecute his or her claim. Neither the statute nor the Kansas Workers Compensation Act simplistically

define a “lack of prosecution” as taking longer than three years from the date of filing an application for preliminary hearing to get to a regular hearing, settlement hearing or award. Just because a respondent may file for dismissal based on “lack of prosecution” after three such years does not mean a lack of prosecution occurred because three years came and went. Yet, this is the approach embraced by the Board majority. Equating the facts of this specific case with a lack of prosecution is incorrect.

The fourth sentence in K.S.A. 2011 Supp. 44-523(f) says:

If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge **for lack of prosecution**.

Therefore, a judge may only dismiss a case if there is: (1) a lack of prosecution and (2) a lack of good cause, apparently for not prosecuting the case faster. The Board majority acknowledges that the judge found claimant established good cause, but misses that the judge lacked the jurisdiction to dismiss the case absent a lack of good cause.

K.S.A. 2011 Supp. 44-523(f) specifically requires a lack of prosecution. If there is a lack of prosecution (and not merely the passage of time in an otherwise vibrantly litigated claim), the judge may consider a motion by respondent to dismiss. On such consideration, the judge must find claimant did not have just cause for getting to a regular hearing, settlement hearing or award within three years after the application for hearing was filed. In other words, the statute only requires a motion to extend during the three year period if there has been a lack of prosecution. A claimant need not even ask for an extension if the case does not suffer from a lack of prosecution.

This Board Member believes the majority has imposed an unnecessary rule created by the ambiguity of K.S.A. 2011 Supp 44-523(f): a requirement that a claimant must file a motion within three years of the filing of his or her application for hearing to extend the claim, or it will be dismissed. Furthermore, under the majority’s interpretation of K.S.A. 2011 Supp 44-523(f), there are no exceptions to this requirement. Theoretically, a claim where a preliminary hearing was held two years and eleven months after the application for hearing was filed could be dismissed merely because of the foregoing requirement. In order to avoid this pitfall, this Board Member has observed counsel for claimants filing a motion to extend pursuant to K.S.A. 2011 Supp 44-523(f) on the same day they file an application for hearing on behalf of their client.

If the Legislature intended K.S.A. 2011 Supp. 44-523(f) to be an absolute bar to workers compensation litigation if a claimant did not make it to a regular hearing, settlement hearing or award within three years from the filing of an application for hearing, it certainly could have said so with plain, outright and obvious terms. For instance, the Kansas Legislature could have said, “Any claim that does not proceed to a regular hearing, settlement hearing or agreed award within three years after the filing of an application for

hearing must be dismissed with prejudice.” Instead, it added caveats concerning “lack of prosecution” and lack of “good cause.”

Granted, K.S.A. 2011 Supp. 44-523(f) could be read narrowly, as the majority has done. However, this proposal is equally, if not more, valid and shows the statute is vague and ambiguous. Insofar as the statute is vague as to purpose and effect, it is entirely proper to look at the legislative history, which shows the purpose of the statute is to dispose of dormant claims, not to jettison active and compensable claims.

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BOARD MEMBER

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Steven M. Roth, Administrative Law Judge